

FILED

FEB 01 2012

United States Bankruptcy Court
San Jose, California

UNITED STATES BANKRUPTCY COURT

NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES BANKRUPTCY COURT
For The Northern District Of California

In re

JAMES MADISON KELLEY,

Debtor.

JAMES MADISON KELLEY

Plaintiff,

vs.

JPMORGAN CHASE BANK, N.A., ET AL.,

Defendants.

Case No. 08-55305-ASW

Chapter 11

Adv. Proc. No. 10-5245

**MEMORANDUM DECISION RE MOTION FOR LEAVE
TO AMEND FIRST AMENDED COMPLAINT**

Before the Court is the motion of plaintiff and debtor James Madison Kelley ("Plaintiff") to amend Plaintiff's First Amended Complaint ("Motion"). In the Motion, Plaintiff seeks to add new claims for: (1) lack of prudential standing; (2) lack of constitutional standing; (3) lack of enforceability under Uniform Commercial Code Article 9; (4) Fair Credit Reporting Act ("FCRA") violations; (5) Fair Debt Collection Practices Act ("FDCPA")

1 violations; (6) Deceptive Practices Act violations; (7) slander of
2 title; and (8) quiet title. Plaintiff also seeks to add Quality
3 Loan Service Corporation ("Quality") as a defendant for Quality's
4 alleged FDCPA violations. Defendant JPMorgan Chase Bank, N.A.
5 ("Defendant") opposes the Motion on the grounds that Plaintiff
6 failed to attach a proposed amended pleading so that Defendant and
7 the Court can assess the allegations of the new causes of action
8 against Defendant and the proposed new defendant, Quality, under
9 Federal Rule of Civil Procedure 15 ("Rule 15"). Defendant also
10 opposes the Motion on the ground that the proposed claims are
11 unnecessary, fail to state a claim, and are barred.

12 At the hearing on the Motion, the Court heard oral argument on
13 the Motion and the matter was taken under submission. Debtor is
14 appearing in propria persona. Defendant is represented by
15 Christopher Yoo, Esq. of Alvarado Smith, P.C. This Memorandum
16 Decision constitutes the Court's findings of fact and conclusions
17 of law, pursuant to Rule 7052 of the Federal Rules of Bankruptcy
18 Procedure.

19
20 I.

21 PROCEDURAL HISTORY

22 On September 19, 2008, Plaintiff filed a voluntary chapter 11
23 petition. On July 15, 2010, Plaintiff filed this adversary
24 proceeding seeking to invalidate two home mortgage loans
25 (collectively, "Loans") or rescind the Loans under the Truth In
26 Lending Act on Plaintiff's property at 14390 Douglass Lane,
27 Saratoga, CA ("Property"). On August 17, 2010, Defendant filed a
28 motion to dismiss the adversary complaint which Plaintiff opposed.

1 At a hearing on October 8, 2010, the Court granted Defendant's
2 motion to dismiss the complaint with leave to amend. On
3 October 29, 2010, Plaintiff filed a First Amendment Complaint
4 ("FAC"). The FAC seeks rescission of the first and second deeds of
5 trust against the Property as well as declaratory relief seeking to
6 invalidate the Loans. On September 28, 2011, after the close of
7 discovery, Plaintiff filed this Motion for leave to amend the FAC.
8 Plaintiff did not attach a proposed amended complaint to the
9 Motion. In Defendant's opposition, Defendant also requests the
10 Court to take judicial notice of several documents relating to the
11 Loans as well as Defendant's purchase agreement ("Purchase
12 Agreement") with the Federal Deposit Insurance Corporation
13 ("FDIC"). Plaintiff opposes the request to take judicial notice.
14

15 II.

16 FACTS

17 The following facts are taken from Defendant's opposition as
18 allegations. Plaintiff obtained a mortgage loan in the sum of
19 \$2,992,265.00 secured by a deed of trust ("DOT") encumbering the
20 Property. The DOT was recorded on July 31, 2007, with the Santa
21 Clara County official records as instrument number 19532063. The
22 DOT identifies Washington Mutual Bank, FA ("WAMU") as the lender
23 and beneficiary, California Reconveyance Company ("CRC") as the
24 trustee and Plaintiff as the borrower. Plaintiff also obtained a
25 home equity line of credit with a maximum credit line of
26 \$250,000.00 ("HELOC") secured by a deed of trust ("HELOC DOT")
27 encumbering the Property. The HELOC DOT was recorded on October 3,
28 2007. The HELOC DOT identifies WAMU as the lender and beneficiary,

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1 CRC as the Trustee and Plaintiff as the borrower. Plaintiff
2 defaulted on the Loans and a notice of default to sell under the
3 DOT was signed on September 26, 2007 ("NOD"). The NOD was recorded
4 by Quality on or around June 30, 2008 with the Santa Clara County
5 official records as instrument number 19902698, though Quality was
6 not substituted as the trustee until August 12, 2008. The NOD
7 indicates that, as of June 30, 2008, the amount in arrears was
8 \$39,087.37. A substitution of trustee in connection with the DOT
9 was recorded on or around August 12, 2008 with the Santa Clara
10 County records as instrument number 19952396. Quality was
11 substituted as the new trustee. On September 25, 2008, the Office
12 of Thrift Supervision closed WAMU and appointed the FDIC as
13 receiver. On the same date, Defendant entered into the Purchase
14 Agreement with the FDIC acting in the FDIC's corporate capacity as
15 well as receiver for WAMU.

16 Plaintiff's Motion alleges that Defendant has violated the
17 FCRA and the FDCPA. Specifically, Defendant allegedly violated the
18 FCRA based on discovery showing that Defendant allegedly,
19 intentionally and deceptively, altered Plaintiff's credit history
20 with Equifax, TransUnion, and Experian to show falsely that
21 Plaintiff made loans in 2005 and 2007 with Chase. Defendant
22 allegedly is a not a real party in interest and lacks
23 constitutional and prudential standing to bring proofs of claim on
24 both of the Loans because there are no documents which evidence a
25 chain of assignments from the original lender to Defendant. The
26 Motion contends that, according to the evidence in the Purchase
27 Agreement and in the FDIC v. LSI appraisal case filed in the
28 Central District of California on May 9, 2011 (Case No. SACV11-706

1 JST), the Loans were charged off. Because there are no documents
2 showing that the Loans were transferred to Defendant via
3 receivership, Defendant paid nothing for the Loans and cannot have
4 damages in connection with any contract. The DOTs and the
5 adjustable rate rider offered by Defendant in support of
6 Defendant's proofs of claim 2 and 3 are not original and therefore
7 do not prove that Defendant has standing. There are no
8 assignments, allonges or endorsements in evidence transferring the
9 Loans to WAMU or to Defendant. Plaintiff further alleges that
10 Defendant and Quality intentionally caused a false notice of
11 default as well as substitution of trustee to be recorded in Santa
12 Clara County which misrepresented the lender. Defendant and
13 Quality persisted in foreclosing on the Property based on the
14 allegedly false NOD and DOT after being notified of the
15 misrepresentations in those documents. Quality used the
16 foreclosure process to attempt to collect the debt on the home loan
17 note and clearly indicated on the NOD that Quality was attempting
18 to collect a debt.

20 III.

21 ANALYSIS

22 **A. Failure to Attach a Proposed Amended Complaint**

23 Bankruptcy Local Rule 1001-2 incorporates Civil Local Rule
24 10-1 which provides: "Any party filing or moving to file an amended
25 pleading must reproduce the entire proposed pleading and may not
26 incorporate any part of a prior pleading by reference." C.L.R.
27 10-1. Plaintiff has not attached a proposed amended complaint to
28 the Motion. The Court has discretion to deny a motion to amend for

1 the failure to attach a proposed pleading as required by local
2 rule. Waters v. Weyerhaeuser Mortgage Co., 582 F.2d 503, 507
3 (9th Cir. 1978). Because the form and substance of the Motion are
4 sufficiently unclear, the Court exercises its discretion in this
5 case to require a proposed amended complaint, and the Motion is
6 denied without prejudice to Plaintiff filing another motion to
7 amend that includes a proposed amended complaint.

8
9 **B. Notice to Plaintiff of Possible Deficiencies in the
Proposed Amendments**

10 In the interest of judicial efficiency, this Court points out
11 certain deficiencies in the proposed amendments, which Plaintiff
12 may want to address before filing another motion to amend. Though
13 the Motion is in the improper form, the Motion contains claims and
14 allegations which the Court will take to be the basis for
15 Plaintiff's proposed amended complaint.

16 **1. Legal Standard Applicable to All Amendments**

17 Federal Rule of Bankruptcy Procedure 7015 incorporates
18 Rule 15. Under Rule 15, leave to amend pleadings should be freely
19 given in the interest of justice by applying Rule 15 liberally to
20 carry out the rule's policy in favor of amendments. Fed. R. Civ.
21 P. 15(a)(2); Ascon Props., Inc. v. Mobil Oil Co., 866 F.2d 1149,
22 1160 (9th Cir. 1989). A pro se litigant, especially, must be given
23 leave to amend and notice of the deficiencies in a proposed
24 amendment unless it is absolutely clear that no amendment would
25 cure the deficiencies. Cato v. U.S., 70 F.3d 1103, 1106 (9th Cir.
26 1995).

27 The court's discretion to allow an amended pleading freely is
28 limited by consideration of the four Foman factors -- bad faith,

1 undue delay, prejudice, and futility -- which are not given equal
2 weight. Foman v. Davis, 371 U.S. 178 (1962); Bonin v. Calderon,
3 59 F.3d 815, 845 (9th Cir. 1995); Roth v. Garcia Marquez, 942 F.2d
4 617, 628 (9th Cir. 1991). At this juncture, the Court will only
5 address futility.

6 A proposed amendment is futile only if no set of facts can be
7 proven that amount to a legally sufficient claim or defense.
8 Miller v. Rykoff-Sexton, Inc., 845 F.2d 209, 214 (9th Cir. 1988).
9 This broad standard encompasses many of the more narrow frameworks
10 courts commonly apply such as the standards governing Rule 12(b)(6)
11 failure to state a claim, summary judgment, and frivolousness among
12 others. A proposed amendment is futile if allowing the amendment
13 would merely result in the amended cause of action or defense
14 failing any of the more specific standards in the next stage of
15 litigation. As explained in Moore's Federal Practice:

16 Courts have denied leave to amend in the following situations:

- 17 1. Amendment could not withstand Rule 12 motion to
18 dismiss for failure to state a claim.
- 19 2. The plaintiff is unable to allege facts sufficient
20 to support the complaint.
- 21 3. The claims are frivolous, and no additional facts
22 would cure the deficiency.
- 23 4. The plaintiff is unable to plead with particularity
24 all the specific elements necessary to support the
25 claim.
- 26 5. Plaintiff could not cure defect with amendment
27 because claim had no basis in law.
- 28 6. The amendment would be futile because it would not
withstand a summary judgment motion.
7. The amendment is a reassertion of a previously
abandoned claim or claims already dismissed.

1 8. The amendment does not present any new facts -- only
2 theories -- and provides no satisfactory explanation
for failure to originally develop the claim.

3 9. The plaintiff could not set forth any circumstances
4 that would state a claim because the cause of action
was cut off by an intervening court ruling.

5 3 Daniel R. Coquillette, Gregory P. Joseph, Sol Schreiber, Chilton
6 Davis Varner, Georgene M. Vairo, Moore's Federal Practice § 15.15
7 at 15-57 to 15-61 (3d ed. 2011) (footnotes omitted and enumeration
8 added).

9 The Ninth Circuit has held that the specific test applied for
10 the futility analysis when evaluating whether an amendment states a
11 claim upon which relief can be granted is the same test used in
12 considering the sufficiency of a pleading under Federal Rule of
13 Civil Procedure 12(b)(6). Miller, 845 F.2d at 214. Ninth Circuit
14 law also supports denial of an amendment if a claim is frivolous,
15 has no basis in law, or does not plead with particularity all the
16 required elements to the support the claim. Albrech v. Lund,
17 845 F.2d 193, 195 (9th Cir. 1988) (frivolous claims); Partington v.
18 Buqliosi, 56 F.3d 1147, 1162 (9th Cir. 1995) (failure to plead
19 elements).

20
21 **2. Plaintiff's Proposed Amendment for "Unenforceability of
Mortgage Note Under UCC" is Likely Futile.**

22 Plaintiff's third proposed amendment is formulated as an
23 objection to Defendant's secured proofs of claim 2 and 3 on the
24 notes underlying the Loans.¹ Specifically, Plaintiff's third
25 proposed amendment appears to object to Defendant's standing to
26

27 ¹ Claim #2 filed by JP Morgan Chase, total amount claimed:
28 \$3,189,960.65, filed on October 17, 2008. Claim #3 filed by
JPMorgan Chase Bank, National Association, total amount claimed:
\$253,884.38, filed on December 2, 2008.

1 enforce the loan notes because the notes are not negotiable
2 instruments under Article 3 of the Uniform Commercial Code
3 ("Article 3") and Defendant is not a holder in due course.²
4 Defendant opposes on the ground that Defendant is not required to
5 be holder of the note in order to foreclose under California law
6 and that the Uniform Commercial Code is inapplicable.³

7 Plaintiff claims that the negative-amortization feature of the
8 loan's "option adjustable rate mortgage" does not meet the
9 requirements of being a fixed amount of money due in a prescribed
10 time under Article 3.⁴ However, California Commercial Code section
11 3112(b) -- which enacts the Article 3 provisions in California --
12 provides in relevant part that:

13 Interest may be stated in an instrument as a fixed or
14 variable amount of money or it may be expressed as a
15 fixed or variable rate or rates. The amount or rate of
16 interest may be stated or described in the instrument in
any manner and may require reference to information not
contained in the instrument.

17 Cal. Comm. Code § 3112(b) (West 2011). Because the variable
18 interest rate would not make either note non-negotiable,
19 Plaintiff's claim regarding "UCC enforceability" is likely futile
20 because it would not survive dismissal for failure to state a
21 legally sufficient claim.

22 Plaintiff also claims that Defendant did not give value for
23 the note, implying that Defendant was not a holder in due course.⁵
24 However, California Commercial Code section 3301 provides:

25 _____
26 ² Motion at 5:16-23.

27 ³ Opposition at 8:20-25.

28 ⁴ Motion at 5:10-14.

⁵ Motion at 5:16-20.

1 "Person entitled to enforce" an instrument means (a) the
2 holder of the instrument, (b) a nonholder in possession
3 of the instrument who has the rights of a holder, or
4 (c) a person not in possession of the instrument who is
5 entitled to enforce the instrument pursuant to Section
6 3309 or subdivision (d) of Section 3418. A person may be
7 a person entitled to enforce the instrument even though
8 the person is not the owner of the instrument or is in
9 wrongful possession of the instrument.

10 Cal. Comm. Code § 3301 (West 2011). Because Defendant does not
11 need to be a holder in due course in order to enforce the notes,
12 Plaintiff's claim regarding "UCC enforceability" is likely futile
13 because it would not survive dismissal for failure to state a
14 legally sufficient claim.

15 **3. Plaintiff's Claim for FCRA and "Deceptive Practices Act"**
16 **Violations is Unclear.**

17 Plaintiff's fourth claim against Defendant is for FCRA and
18 "Deceptive Practices Act" violations. The Motion is unclear as to
19 whether Plaintiff asserts a cause of action for unfair credit
20 practices under California law in addition to a federal cause of
21 action under the FCRA. Plaintiff's oblique references to the
22 "Deceptive Practices Act" in the caption of the Motion and the
23 allegations in the fourth claim are unclear because the Court
24 cannot determine under which statute the cause of action arises.
25 It is possible Plaintiff means to assert a claim based on
26 California Civil Code section 1785.25(a) allowed under the
27 exception to state law preemption which exists in FCRA
28 section 1681t(b)(1)(f). Section 1785.25(a) of the California Civil
Code, which has provisions similar to the FCRA, creates a private
right of action to prevent false credit reporting. To cure the
ambiguity, any proposed amended complaint should plead specifically
whether Plaintiff asserts a cause of action arising under section

1 1785.25(a) of the California Civil Code, some other state law
2 provision, or whether only a federal claim under the FCRA is
3 intended.

4 **4. Plaintiff's Claim for Slander of Title is Unclear.**

5 Plaintiff's sixth claim alleges slander of title. The Motion
6 is unclear whether the claim is against Defendant alone or against
7 Defendant and Quality.⁶ Based on the allegations, Quality seems to
8 be the defendant who filed the NOD and Substitution of Trustee, but
9 the Motion has an unclear reference to Chase at page 6, line 21.
10 Plaintiff should cure this ambiguity and specifically plead the
11 claim against one or both defendants in any proposed amended
12 complaint attached to a further motion for leave to amend.

13
14 IV.

15 CONCLUSION

16 For the forgoing reasons, Plaintiff's Motion is denied without
17 prejudice. Counsel for Defendant shall prepare a form of order and
18 submit the proposed order to the Court after service on Plaintiff.

19
20
21 Dated: 2/1/12

Arthur S. Weissbrodt

22
23 ARTHUR S. WEISSBRODT
UNITED STATES BANKRUPTCY JUDGE

24
25
26
27
28

⁶ Motion at 9:22-25.

UNITED STATES BANKRUPTCY COURT
For The Northern District Of California

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